No. 12,197

IN THE

United States Court of Appeals

For the Ninth Circuit

LOUISE HAMILTON,
Appellant,

vs.

NATIONAL LABOR RELATIONS BOARD,
Appellee.

Brief on Behalf of Appellant Louise Hamilton

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STATEMENT REGARDING JURISDICTION

This is an appeal from an order of the United States District Court for the Northern District of California, Northern Division, directing enforcement of a subpoena of the National Labor Relations Board.

The proceeding was commenced in the District Court by an application filed by the Labor Board. It sought court enforcement of a subpoena issued by the Board. This had

issued in the course of a hearing being conducted by a Trial Examiner in the Board's proceeding designated Case No. 20-C-1570, 1571, 1572. It was directed to Louise Hamilton, appellant in this Court, who is not one of the parties to the proceeding before the Board. After she was served with the subpoena, the appellant filed with the Board her petition to revoke the subpoena (R. 9-12). This was filed in accordance with Section 11(1) of the National Labor Relations Act and with the Rules and Regulations of the Board with respect to subpoenas. Appellant's petition was based upon the same grounds as those she relies upon on this appeal.

Subsequent to her filing of the petition to revoke the subpoena, the appellant Louise Hamilton was directed by the Trial Examiner to be sworn. Upon advice of counsel, she refused to do so on the grounds stated in the petition.

Thereafter, the General Counsel on behalf of the Board filed on July 29, 1948 its "Application for Order Requiring Obedience to Subpoena Duces Tecum" (R. 1-12) with the District Court. In this application the Labor Board alleged that that Court had jurisdiction by virtue of Section 11(2) of the National Labor Relations Act (R. 1).

The appellant herein filed her return to the order to show cause and her answer to the application for the order on August 31, 1948 (R. 13-49). Thereafter, the matter was argued orally and memoranda were filed with the District Court. Subsequently, on December 28, 1948, the District Court issued a memorandum and order requiring obedience to the *subpoena duces tecum* (R. 50-54). On January 17, 1949, an order directing compliance with the *subpoena duces tecum* was issued by the District Court (R. 55).

On January 27, 1949, within 30 days after entry of judgment for the Labor Board, appellant filed a notice of appeal (R. 56). This court has jurisdiction of the appeal (28 U.S.C. Sections 1291, 1294). On January 27, 1949, the District Court issued an order for a stay pending respondent's appeal (R. 56). Appellant filed a designation of the record on appeal on February 16, 1949 (R. 57-58). With this designation, filed in the District Court, appellant filed a statement of the points to be relied upon on this appeal (R. 58-60).

On February 28, 1949, the Clerk of the District Court certified the transcript of record on appeal (R. 60-61). On March 1, 1949, the record was filed with the Clerk of this Court. On March 8, 1949, appellant filed with this Court a statement of points to be relied upon on this appeal and a designation of the record (R. 62-65).

STATEMENT OF THE CASE

Appellant is an individual whose testimony was demanded by the Labor Board in a formal hearing with respect to alleged unfair labor practices. She was not a party to the proceeding. She was an employee of a partner of one of the employers who was alleged to have engaged in the unfair labor practices.

Appellant contends that the subpoena should not be enforced because such enforcement would sanction an unlawful and unconstitutional abuse of the subpoena power by the Labor Board and would be a misuse of the court's discretion. The witness relies on grounds that she raised before the Board by petition to revoke the Board's subpoena.

The appellant asserts that it is a violation of her statutory and constitutional rights to compel her to comply with the Board's subpoena. This subpoena was issued by the Board in the course of a proceeding that was wholly outside its jurisdiction and authority and over which it had no possible claim of jurisdiction. This affirmatively appears on the face of the formal papers before the Board as well as in the record taken.

This issue arose in the following manner.

Reports that certain acts were unfair labor practices were filed with the National Labor Relations Board by a labor organization on January 26, 1948 (R. 31-34). The reports filed with the Board did not include certain of the allegations that are required by the Board's regulations to constitute a charge of unfair labor practices. Nevertheless, the General Counsel of the Board commenced to proceed under Section 10(b) of the Act on the basis of these reports just as if proper charges of unfair labor practices, as contrasted to mere reports of unfair labor practices, had been filed.

On the face of the purported charges it clearly appears that they complain of certain acts that occurred in August, 1946, some seventeen months prior to their date and their filing. These "charges" were, nevertheless, thereafter served upon certain of the respondents who were said to have been guilty of the alleged unfair labor practices. For the purpose of this proceeding it is admitted that service occurred on February 13, 1948.

Thereafter the General Counsel, apparently disregarding the provision of Section 10(b) of the Act as amended —that no complaint shall issue based on an alleged unfair

labor practice occurring more than six months before the charge is filed *and served*—proceeded to act as if authorized to issue a complaint. Thus on April 26, 1948, a purported complaint and notice of hearing (R. 24-36) was mailed from the office of the Board in San Francisco to certain of the respondents named in the complaint. This document affirmatively shows *upon its face* that it is based upon alleged unfair labor practices that occurred more than seventeen months before the "charges" were prepared, filed or served (R. 31-36).

The form of the purported complaint (R. 26-36) likewise apparently ignores the 1947 amendments to the Act. True, it properly alleges the facts necessary to show the Board's jurisdiction under the Act as it was prior to the 1947 amendments. It fails, however, to allege the facts necessary to give jurisdiction under the 1947 amendments. Thus the purported complaint is silent as to the jurisdictional fact of the date of the service of a charge and includes no allegation to controvert the fact shown on its face that it was based on a charge filed too late to give it any jurisdiction.

The purported complaint likewise is silent as to the jurisdictional facts of compliance by the charging labor organization with the non-Communist affidavit provisions and other provisions of subsections (f), (g) and (h) of Section 9 of the Act, as amended in 1947. Subsection (h) gives the Board jurisdiction to act on a charge filed by a labor organization only if the officers of that labor organization have each filed a non-Communist affidavit. The purported complaint shows on its face that the charge was filed by a labor organization (R. 32, 34, 36), but it

includes no allegation that the officers of the charging labor organization have filed the required affidavits. It is admitted that no president or secretary of the charging labor organization has filed such an affidavit (R. 48, 49).

Despite the affirmative lack of jurisdiction apparent on the face of the purported complaint and despite the failure of the Board to allege the facts necessary to give the Board jurisdiction, the employers served as respondents were present at the hearing before the Trial Examiner, which began on June 14, 1948.

At the beginning of the hearing, and recurringly during its course, these employers brought the foregoing facts to the attention of the Trial Examiner (R. 37-46). The proceeding nevertheless continued from June 14, 1948 to June 23, 1948. On the latter date there was no evidence in the record to cure the defects on the face of the complaint or to show that the Board had jurisdiction over the proceeding. The attorneys representing the General Counsel of the Board advised the Trial Examiner that they would submit no evidence in their case in chief with respect to the jurisdictional facts discussed above and that they had concluded their case in chief with the exception of certain facts as to other matters which they wished to present through the testimony of Louise Hamilton, appellant in this Court.

The General Counsel of the Board had obtained a subpoena requiring Louise Hamilton to testify on or before June 28, 1948. The subpoena was issued purportedly in accordance with the provisions of Section 11(1) of the Act. It was served on the witness on June 23, 1948. On the same day, she filed with the Board her

petition to revoke the subpoena, this being done in accordance with Section 11(1) of the Act. This petition (R. 9-12) was filed—as required by the Board's Rules and Regulations, Section 203.31—with the Trial Examiner who was conducting the hearing and who had in fact filled in the blanks as to the name of the witness and the date of her appearance to complete the issuance of the Board's subpoena.

After the petition to revoke the subpoena had been filed, the Trial Examiner announced that the petition was denied. Apparently the Examiner was acting for the Board in accordance with Section 203.35 of the Board's Rules and Regulations, which provides:

> "The Trial Examiner shall have authority, with respect to cases assigned to him, between the time he is designated and transfer of the case to the Board, subject to the Rules and Regulations of the Board and within its powers * * *.
>
> "(c) to rule upon petitions to revoke subpoenas."

After announcing the denial of the petition to revoke, the Trial Examiner of the Board asked the witness to be sworn. The appellant was advised by counsel not to be sworn and to refuse to testify. She did so. Thereupon, still on June 23, 1948, the Trial Examiner adjourned the proceeding of the Board *sine die*.

Subsequently, on July 29, 1948, the National Labor Relations Board filed an "Application for Order Requiring Obedience to Subpoena Duces Tecum" in the District Court of the United States for the Northern District of California, Northern Division (R. 1-12). Such application alleged that the District Court had jurisdiction by virtue

of Section 11(2) of the National Labor Relations Act which gives such jurisdiction "in case of contumacy or refusal to obey a subpoena issued." (R. 1).

On August 25, 1948 the appellant filed its Return and Answer in opposition to the application (R. 13-46). This repeated the grounds relied upon in the petition to revoke the subpoena. In the petition to revoke the subpoena, before the District Court, and on this appeal *the basic contention of the witness is that the subpoena is ancillary to a Board proceeding over which the Board has no possible jurisdiction or authority to proceed.*

The appellant supported this basic contention by the showing outlined hereinabove based upon the formal papers of the Board and the jurisdictional requirements of Section 9(f), (g) and (h) and Section 10(b) of the Act. The District Court nevertheless ordered enforcement of the subpoena (R. 50-54). Appellant contends that such action deprived her of her constitutional and statutory rights and was an abuse of the discretion granted the court by Section 11(2) of the National Labor Relations Act.

The District Court concluded that the Board had jurisdiction to proceed on the basis of a charge served within six months of the effective date of the 1947 amendments to the National Labor Relations Act even if served more than six months after the acts occurred (R. 51, 52). Appellant contends that this conclusion is contrary to law.

The District Court concluded that it should enforce the subpoena although the formal papers of the Board contained no allegations showing that it had jurisdiction (R. 53, 54). Appellant contends that the failure to allege facts

showing jurisdiction demonstrates that the Board has not made a sufficient claim to jurisdiction over its proceeding to entitle it to judicial enforcement of its ancillary subpoena. We contend this failure has substantially the same effect as a failure to allege jurisdictional facts in the federal courts.

The District Court concluded that the witness could not defend in that court against the abuse of the subpoena power on the ground that administrative remedies had not been exhausted and that the witness had not properly raised the question of jurisdiction before the Board (R. 53). Appellant contends that the defense made in the District Court, and relied upon in this court, may be raised for the first time in court in opposition to the Board's request for judicial relief. She furthermore contends that she properly raised the question of jurisdiction before the Labor Board and exhausted the statutory administrative remedies available to her before the Board went to court.

SPECIFICATION OF ERRORS

Appellant contends:

1. The District Court erred in not denying enforcement of the subpoena of the National Labor Relations Board on the ground that the Board has no possible jurisdiction or authority to proceed with the hearing in the Board's proceeding "Cases Nos. 20-C-1570, 1571, 1572," to which the subpoena was ancillary.

2. The District Court erred in not finding that the National Labor Relations Board has no possible jurisdiction or authority to proceed in the said hearing in consequence of the fact that the purported complaint—upon which any

jurisdiction or authority depends—is based upon a purported charge that was not served upon the person charged until more than 17 months after the occurrence of the alleged unfair labor practice.

3. The District Court erred in not finding that no charge, within the meaning of the National Labor Relations Act, was filed to commence the said proceeding and in consequence thereof that the Board has no possible jurisdiction or authority to proceed in the said hearing.

4. The District Court erred in not finding that at the time of the preparation and mailing of the said purported complaint there was not on file with the Board a non-Communist affidavit executed by each officer of the charging labor organization, particularly the President and Secretary of such organization, and in consequence thereof that the Board has no possible authority or jurisdiction to proceed in the said hearing.

5. The District Court erred in not finding that the National Labor Relations Board has no possible authority or jurisdiction to proceed in the said hearing in consequence of the fact that the said purported complaint contains no allegations of the jurisdictional facts required by Section 9(f), (g), (h) of the National Labor Relations Act.

6. The District Court erred in not finding that no complaint issued in the Board proceeding "Cases Nos. 20-C-1570, 1571, 1572," and in consequence that the Board has no possible jurisdiction or authority to proceed in the said hearing in that proceeding.

7. The District Court erred in concluding that appellant Louise Hamilton failed to exhaust her administrative remedies.

8. The District Court erred in concluding that appellant Louise Hamilton had not properly raised the question of jurisdiction before the National Labor Relations Board.

9. To enforce the subpoena is to deprive the appellant of her rights under the Fourth Amendment to the Constitution of the United States and to deprive her of liberty without due process of law in violation of the Fifth Amendment.

ARGUMENT OF THE CASE

Summary.

The courts, when called upon to enforce administrative subpoenas, have the duty under the statute and the Constitution to protect individuals against unreasonable or arbitrary exercise of the subpoena power and to refuse to enforce any subpoena issued in excess of the statutory authority or jurisdiction of the administrative board. The Fourth Amendment to the Constitution of the United States prohibits any arbitrary, capricious, unreasonable or unlawful exercise of the subpoena power. The National Labor Relations Act and the Administrative Procedure Act require the court to deny enforcement of a subpoena where an appropriate defense is interposed.

The appellant has several appropriate statutory and constitutional defenses that require the court to refuse enforcement of the subpoena. It affirmatively appears upon the face of the formal documents in the proceeding before the Board that the Board has no possible jurisdiction or authority to carry on its proceeding. The pleadings show that no charge was filed, although the filing of a charge is jurisdictional. They show that neither

a charge, nor even a purported charge, was served within six months of the occurrence of the alleged unfair labor practices, although service within six months is jurisdictional. They fail to contain allegations of jurisdictional facts as to the date of the service of the charge or as to the filing of the non-Communist affidavits required by Section 9 of the Act as amended in 1947.

The appellant, in her timely petition to revoke the subpoena properly filed with the Board, raised all of the foregoing issues before the Board and thereby set in motion all administrative remedies available to her to preclude any action for the enforcement of the subpoena.

The order of the District Court, directing her to comply with the Board's subpoena, violates the statutory and constitutional guarantees of the witness. It does so by refusing to consider her defenses to the subpoena. It does so by enforcing the subpoena issued by an administrative tribunal in the course of a proceeding that was wholly beyond its jurisdiction and authority, which is clear and undeniable first, because of the absence of allegations of the jurisdictional facts and, second, because of the affirmative showing upon the face of the formal papers that there was no possible jurisdiction.

I.

The Witness Has the Right to Raise Her Defenses to the Enforcement of the Subpoena in Court

The memorandum of the District Court (R. 50-54) states that the witness failed to exhaust her administrative remedies and did not properly raise the question of jurisdiction before the Board. While the brief of the Labor

Board before the District Court suggested these contentions, we believe that the Labor Board will agree that the court was in error in reaching these conclusions and we therefore will not argue these points at length in our opening brief.

A. IF THE ADMINISTRATIVE REMEDIES HAVE NOT BEEN EXHAUSTED, THE COURT MUST REFUSE TO ENFORCE THE SUBPOENA.

The Labor Board, *not the witness*, here sought relief in the District Court. Hence, if judicial relief has been prematurely sought, the court should deny the Board's request for judicial relief; it should not deny the respondent below the right to defend against the Board's action in going to court. It is a strange and startling contention that judicial relief must be ordered because there has been no exhaustion of administrative remedies before such relief was sought.

B. THE WITNESS'S DEFENSES OFFERED IN THIS CASE MAY BE INITIALLY MADE IN THE DISTRICT COURT.

The District Court, before it may lawfully enforce a subpoena, is required to investigate the facts and determine that the administrative board can show jurisdiction in the proceeding to which the subpoena is ancillary. (Administrative Procedure Act, Sec. 6(c) quoted below in footnote 16.) Here, the Labor Board has utterly failed to meet the burden of presenting at least a prima facie claim of jurisdiction and authority to conduct its hearing. The citizen served with the subpoena has the right to defend against judicial enforcement by calling the attention of the court to the obvious showing, upon the face of the formal papers of the Board, that there is no possible basis for Board jurisdiction.

The right to make such a defense was expressly recognized by the Supreme Court in *Myers v. Bethlehem Corporation*. In that case, the Court stated (303 U.S. 41, 49):

> "The Board is even without power to enforce obedience to its subpoena to testify or to produce written evidence. To enforce obedience it must apply to a district court; and to such an application appropriate defense may be made."

Here the witness is presenting a defense that the bare "Complaint" shows the Board cannot have jurisdiction. She has the same right to present this defense as has a person collaterally to attack a judgment or to defend in an ancillary proceeding on the ground that the judgment roll shows there was no jurisdiction in the basic proceeding.

C. THE WITNESS PROPERLY RAISED THE JURISDICTION OF THE BOARD BEFORE THE BOARD.

In the present case the witness fully and carefully followed the administrative procedure provided by law to oppose compliance with a subpoena. Immediately after she was served with the subpoena, and five days before her time to appear expired, the witness filed her petition to revoke the subpoena (R. 9-12). This petition was based on the facts and grounds that she relies upon on this appeal. Thus, the petition alleged that on the face of the formal papers before the Board it affirmatively appeared that there was no possible authority or jurisdiction in the Board to carry on the proceeding. It raised the issue as to the time of filing and service of a charge as well as that as to the existence of any charge (Petition, I(a), (b), (c), II(b); R. 9, 10, 12). The petition further alleged that

the purported complaint failed to allege the facts that must necessarily exist, by virtue of the 1947 amendments to the Act, before the Board has jurisdiction to carry on a proceeding. It raised the issues with respect to the failure of the complaint to allege that a charge had been filed and served within six months and its failure to allege that the charging labor organization had satisfied the non-Communist affidavit provisions of the law (Petition I(b), II(b); R. 10-12). The petition further alleged that the record included no proof of these jurisdictional facts and that the attorney representing the General Counsel of the Board had stated that no evidence would be offered or adduced as to such jurisdictional facts (Petition I(c), II(c); R. 11, 12). The petition further alleged in general terms that no complaint had issued (Petition III; R. 12).

This petition to revoke the subpoena was timely and it was filed in accordance with the Board's Rules and Regulations. It fully raised the points that are relied upon on this appeal. Thus, the witness properly raised *before the Board* the question of the Board's jurisdiction through the only statutory procedure open to it, that is, by her petition to revoke the subpoena. By this petition the witness took every step provided by law to dissuade the Board from seeking her testimony and evidence and to raise before the Board the grounds and facts that require the courts to refuse to enforce the Board's subpoena.

D. THE BOARD HAS TAKEN FINAL ACTION ON THE PETITION TO REVOKE AND SO ALL ADMINISTRATIVE REMEDIES HAVE BEEN EXHAUSTED.

By her petition to revoke the subpoena, the witness set in motion all statutory administrative remedies. Upon the filing of the petition it became incumbent upon the Board

to revoke the subpoena if appropriate grounds were stated in the petition. Section 11(1) of the Act[1] provides with respect to subpoenas, as follows:

> "The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, *and the Board shall revoke,* such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required." (The emphasis is added).

No other administrative procedure is provided by law. Thus the Board was obliged to act on the petition and came into full control of the administrative remedies upon the filing of the petition to revoke. We submit the Board cannot now assert, in opposition to the defense to enforcement of the subpoena, that the administrative remedies have not been exhausted.

It seems clear that the petition to revoke the subpoena was denied by the Board. This appears from the fact that the Trial Examiner announced that the petition was denied and he has been delegated by the Board with the

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1. We shall hereinafter from time to time refer to the National Labor Relations Act simply as "the Act."

power to rule upon such a petition to revoke a subpoena.[2]

In fact, the Board, by its allegations before the District Court, admits that the administrative remedies have been exhausted by the allegation that the court has jurisdiction by virtue of Section 11(2) of the Act. This section gives jurisdiction only "in case of contumacy or refusal to obey a subpoena." If the Board has not acted on the petition to revoke filed with it by the witness, there obviously is no case of contumacy or refusal to obey the subpoena, for neither can occur until the Board has denied the petition to revoke.

Furthermore, the act of the witness in refusing to testify, which in turn led to action by the Board in seeking judicial enforcement of the subpoena, is a *de facto* appeal to the Board from the decision of the Trial Examiner. It required the Board to rule on the petition to revoke in deciding to seek enforcement in court. Thus, the filing of the application in the court itself is the final action of the Board in the administrative proceeding commenced by the witness's petition to revoke the subpoena. The Board has finally and conclusively refused to revoke the petition.

To make any other contention would be wholly arbitrary and capricious. Surely, if the administrative procedure begun by the petition to revoke the subpoena has not been completed, this is solely because the Board has chosen to

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2. Section 203.35 of the Board's Rules and Regulations provides in part:

> "The trial examiner shall have authority, with respect to cases assigned to him, between the time he is designated and transfer of the case to the Board, subject to the Rules and Regulations of the Board and within its powers:
> * * * * * * *
> "(c) To rule upon petitions to revoke subpoenas; * * *."

fail to act as required by the law. Obviously the Board cannot deprive the witness of the right to defend against the Board's abuse of power simply by refusing to act on a proper and timely petition to revoke filed with the Board.

II.

The District Court Should Have Refused to Enforce the Subpoena of the Board Because It Clearly and Affirmatively Appeared on the Face of the Board's Formal Papers That the Subpoena Was Issued in the Course of a Proceeding Wholly Outside the Jurisdiction and Authority of the Board.

A federal court does not sit as a rubber stamp to enforce indiscriminately all administrative subpoenas. The courts have the duty to prevent abuse of the subpoena power by administrative tribunals. The statutes declare this duty with respect to subpoenas of the Labor Board.[3]

The appropriate defense presented by Louise Hamilton, appellant in this court, is that the Board's formal papers clearly and affirmatively show that the Board could have no possible jurisdiction in the proceeding to which the subpoena was ancillary. We shall hereinafter in this point show, first, the lack of jurisdiction and the fact that it is clearly and affirmatively obvious on the face of the Board's formal papers and, second, that the District Court should have refused to enforce the subpoena in view of this showing.

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3. This duty is imposed upon the courts by Section 11(2) of the National Labor Relations Act and Section 6(c) of the Administrative Procedure Act. These provisions, together with the Senate Report on the subsection from the Administrative Procedure Act, are quoted below in footnotes 15 and 16, infra.

A. THE BOARD'S FORMAL PAPERS CLEARLY AND AFFIRMATIVELY SHOW THERE WAS NO POSSIBILITY OF JURISDICTION IN THE BOARD.

The Labor Board, being a creature of legislation, has no inherent or common law power. Hence, its jurisdiction and statutory authority is limited to that granted by the National Labor Relations Act, as amended. 3 Sutherland, *Statutory Construction,* 3rd Ed., Section 6603; *Arrow-Hart and Hegeman Electric Co. v. Federal Trade Commission,* 291 U.S. 587, 598; *Stark v. Wickard,* 321 U.S. 288, 309.

The appellant asserts that the Labor Board has no jurisdiction to proceed on the purported complaint that is the basis for this hearing because (1) no charge was served within six months of the facts, (2) no true charge was filed, (3) the officers of the union that filed the charge did not have the necessary non-Communist affidavits on file with the Board, (4) the jurisdictional facts, negating the above, are not alleged in the complaint, and (5) no complaint was legally issued.

1. It Affirmatively Appears on the Face of the Formal Papers of the Board That No Charge Was Served Until 17 Months After the Occurrence of the Alleged Unfair Labor Practices Although the Board Has No Jurisdiction to Hold a Hearing on an Unfair Labor Practice Occurring More Than Six Months Prior to the Filing and Service of the Charge.

The 1947 amendments to the National Labor Relations Act inserted a new proviso immediately after the grant of authority to issue complaints in Section 10(b).[4] It reads:

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4. The entire subsection, as amended, reads:
"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent

"*Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge."

This prohibition on the issuance of a complaint—and in turn on the jurisdiction of the Board to hear—was enacted on June 23, 1947 with provision that it become effective on August 23, 1947. *Labor-Management Relations Act,* 1947, Section 104.

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or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C)."

The formal papers upon which the jurisdiction of the Board depends show that the basis of the proceedings is a document entitled "Second Amended Charge" which is dated January 26, 1948 (R. 31-36). The formal papers further allege that the acts alleged to be unfair labor practices occurred on or about August 1, 1946 (R. 28, 29). The purported complaint that is asserted to give the Board jurisdiction over the hearing is dated April 26, 1948. Thus, it clearly and affirmatively appears that the Board's purported complaint and the entire proceeding is based on an unfair labor practice that occurred approximately 17 months prior to the filing of the charge with the Board and the service of a copy thereof upon the employer alleged to have been guilty of the unfair labor practice.[5]

The amendment quoted above clearly limits the jurisdiction of the Board. The language is jurisdictional on its face. The courts have expressly held that the less positive language at the beginning of Section 10(b) of the Act limits the jurisdiction of the Board.[6] Thus, the language authorizing the Board to issue a complaint and hold a hearing "whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice" has been held to make the filing of a charge and the issuance of a complaint jurisdictional facts. *Labor Board v. Hopwood Retinning Co.*, 98 F.(2d) 97, 101; see *Labor Board v. National Licorice Co.*, 104 F.(2d) 655, 658. Furthermore, the language added to Section 10(b) is very similar to that incorporated in Section 8 of the Norris-LaGuardia Act, reading:

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5. The Board admits that the delay in serving the charge is not excusable by reason of service in the armed forces (R. 49).

6. This provision is quoted in full in footnote 4.

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply * * *" (29 U.S.C. Sec. 108)

This language has been held to be jurisdictional and deprives the federal courts of any jurisdiction except where the complainants have complied. *Donnelly Garment Co. v. International Ladies Garment Workers' Union,* 99 F.(2d) 309, 316; *Grace v. Williams,* 96 F.(2d) 478, 481.

The Board apparently admits that the language is jurisdictional but asserts that it does not apply in the present case because the charge was served on February 13 1948, within six months of August 23, 1947, the date when the 1947 amendments became effective.

a. The Act Grants No Jurisdiction Based on Stale Charges Served Between August 23, 1947, and February 23, 1948.

The Act, however, gives no support for the contention of the Board that the proviso must be ignored in this case. The amendment to Section 10(b) is simple, clear and direct. It reads:

> "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made."

This prohibition on the issuance of a complaint became effective on August 23, 1947, sixty days after its enactment.[7] We submit that Congress has clearly, simply and directly stated its intent, that it has the power to with-

7. Labor-Management Relations Act of 1947, Section 104.

draw from the Board jurisdiction over any cases pending before it, and that Congress provided a reasonable period after the enactment of the law during which complaints could have been issued with respect to stale charges if this was deemed necessary to effectuate collective bargaining.

The District Court concluded that a complaint could lawfully issue based upon an unfair labor practice if a charge were filed within six months of the effective date of the 1947 amendments. We submit there is no basis for this conclusion and that the cases cited in no way support that conclusion.

In support of its conclusion, the District Court stated, "Normally, changes of procedure operate in the future and not retroactively; *National Labor Relations Board v. National Garment Co.,* 166 F.2d 233, and *National Labor Relations Board v. Brozen,* 166 F.2d 812." (R. 52). The court apparently misconstrued appellant's position. She does not ask that the 1947 amendment to Section 10(b) be made retroactive; she merely asks that it be made effective on the date that Congress declared it be effective. Her position is entirely different from that taken in opposition to the Board in the cases cited by the District Court. In *Labor Board v. National Garment Co.,* the respondent resisted the Board's enforcement of an order issued prior to the effective date of the 1947 amendments on the patently erroneous ground that the 1947 amendments voided all orders of the Board that had previously been entered but not enforced in court. The court held that the 1947 amendments did not have retroactive effect so as to deprive it of jurisdiction to enforce a Board

order entered prior to the amendments. In *Labor Board v. Brozen,* the respondent sought to prevent enforcement of the Labor Board order dated August 30, 1946. The apparent ground was that the order involved an unfair labor practice occurring more than six months prior to the filing of the charge with the Board. In that case the charge had been filed, the complaint had been issued and the Board had entered its order long prior to the amendments of the Act. The court held that the amendments did not have retroactive effect so as to void an order based on a complaint issued before the law was amended. *In each of the two cases cited the complaint issued long before the 1947 amendments were enacted.*

In the proceeding involved in this appeal, in contrast to the foregoing cases, no complaint was issued before the amendments became effective. The General Counsel purported to issue a complaint many months after the effective date of the 1947 amendments; this clearly contravened the prohibition of Section 10(b) as then in effect.

The District Court also supported its conclusion that the Board had jurisdiction to issue a complaint on the ground that the amendment to Section 10(b) established a limitation on the right to issue complaints and was therefore to be interpreted in violation of its clear language. Thus, it stated,

> "Where by statute the time within which the existing right may be exercised is shortened parties affected must be afforded a reasonable time to exercise their remedy. *Rand v. Bossen,* 162 Pac.2d 457; 27 C. 2d 61." (R. 52)

The holding of the case cited, which is supported therein by a rule stated in *Rosefield Packing Co. v. Superior*

Court, 4 C.2d 120, 122, 47 Pac.2d 716, is based upon constitutional guarantees limiting state legislatures, and precluding the impairment of an obligation of a contract or the deprivation of a private right without an adequate remedy. *Rand v. Bossen* further declares,

> "What constitutes a reasonable time (within which parties affected may exercise their existing remedies to protect their private rights) is primarily a question for the legislature and a court will not overrule its decision except where palpable error has been committed." (27 C.2d 61, 66).

The rule relied upon by the District Court does not apply to an act of Congress. Even if it were applicable, the Congress has provided a reasonable time for issuing complaints; hence its prohibition of jurisdiction was in any event properly and lawfully made effective August 23, 1947, as is provided in Section 104 of the Labor Management Relations Act, 1947.

First, Congress is not subject to the constitutional limitations that are the basis for the decision of the California state court. There is no limitation upon the power of Congress to cut down or eliminate the jurisdiction of the National Labor Relations Board. Congress has a right, not limited by the Constitution, to withdraw any of the jurisdiction it has granted or to limit it. *Ex parte McCardle,* 7 Wall. 506; *Assessors v. Osbornes,* 9 Wall. 567; *Kline v. Burke Construction Co.,* 260 U.S. 226. These cases uphold the right of Congress to withdraw jurisdiction even where private rights are thereby destroyed and all remedy to enforce them abolished.

With respect to the jurisdiction of the Labor Board, Congress has an even broader right to change the jurisdiction granted. No private rights are created by the National Labor Relations Act; no individual has any vested or constitutional right to relief before the Board. "The Board * * * does not exist for the 'adjudication of private rights'; it 'acts in a public capacity to give effect to the declared public policy of the act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining'." *Phelps Dodge Corp. v. Labor Board,* 313 U.S. 177, 193. Again, the Supreme Court has said, in connection with Labor Board proceedings, "We are dealing here not with private rights." *International Association of Machinists v. Labor Board,* 311 U.S. 72, 80. The Supreme Court has expressly held that no individual has a right to enforce a Board order directing that he be given back pay. "The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions in interstate commerce." *Amalgamated Utility Workers v. Consolidated Edison Co.,* 309 U.S. 261, 265. It is furthermore well-established that no individual has a right to compel action before the Labor Board.

> "It will be noted that the jurisdiction of the Board is not a compulsory jurisdiction. Assuming that all circumstances looked to by the Act are in existence, none the less we are of the opinion that the Board does not have a cause to complaint to be issued against the employer or proceed to prohibit any unfair labor practices complained of. The course to be

pursued rests in the sound discretion of the Board and is the concern of expert administrative policy." (*Jacobsen v. Labor Board,* 120 F.2d 96, 100).

Since the Board is merely a creature of Congress and acts simply to protect the public interest, Congress has a complete and unrestricted right to direct the Board to refrain from issuing complaints in any type of unfair labor practice proceedings. Since the Board had jurisdiction to refrain from issuing a complaint on a charge served more than six months after the unfair labor practice, Congress can direct it to refrain. By the 1947 amendments it has exercised this power. It has directed that a complaint shall not issue, and hence that no hearing shall be had, with respect to an unfair labor practice unless a charge has been filed and served within six months of the occurrence of the unfair labor practices. Congress has concluded that it is contrary to the public interest to permit the Board to have jurisdiction with respect to such unfair labor practices. In its sovereign power, it has declared that, effective August 23, 1947, no complaint shall issue under the circumstances involved in the present case.

It is to be noted that Congress did not withdraw jurisdiction in this fashion precipitously. Thus, the amendments provided that they were to become effective 60 days after the passage of the Act. Surely, this 60-day period was a reasonable time within which complaints could have been issued on stale charges. Thus, even if private rights were involved and the 1947 amendments had destroyed them, or withdrawn every remedy for their enforcement, the Congress would have met the

limitations imposed upon state legislatures. In this case, where Congress is not subject to the limitations that were the basis for the decision in *Rand v. Bossen* and where no private rights are involved, the withdrawal of jurisdiction by Congress must be made effective as of the date that Congress declared it should have been made effective. There is no basis for any assertion that the clear language of the statute should be modified by judicial interpretation.

It is thus clear upon the face of the formal papers that the Board has no jurisdiction because the proceeding is based upon a purported complaint issued in violation of the provision of Section 10(b) and so without any supporting statutory authority or jurisdiction.

2. It Affirmatively Appears on the Face of the Formal Papers of the Board That It Could Not Possibly Have Jurisdiction Because No True Charge Has Ever Been Filed.

The filing of a charge is the initial procedural step to give jurisdiction to the Labor Board in an unfair labor practice proceeding, such as that to which the subpoena involved herein is ancillary. Section 10(b) of the Act gives the Board power to issue a complaint on an unfair labor practice "whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice."[8] This has been held to make the filing of a charge and the issuance of a complaint jurisdictional facts. The Second Circuit Court of Appeals has stated the law in this regard as follows:

> "This procedure (the filing of a charge, etc.) is required as a prerequisite to the jurisdiction of the

8. Section 10(b) is printed in full in footnote 4 above.

> Board and the complaint issued and the subsequent hearing must be in accord with the charge in an attempt to prove or rebut such charges."

Labor Board v. Hopwood Retinning Co., 98 F.2d 97, 1010. Therefore, if a charge was not filed, there was no basis for the issuance of a complaint or for the holding of a hearing or for the issuance of a subpoena, because no proceeding has lawfully commenced.

The Board's jurisdiction, if any there be, must stem from the purported charges of January 26, 1948 (R. 31-36). It appears on the face of these papers, that they have been filed by a labor organization, the International Union of Brewery, Flour, Cereal and Soft Drink Workers of America, CIO, Local 227. It further appears on the face of these documents that they fail to include a statement as to whether it and any national or international labor organization of which it is an affiliate or constituent unit have complied with Section 9(f), (g), and (h) of the Act, and that they fail to contain any reference to the number and expiration date of the letter of compliance issued by the Secretary of Labor. In these respects these documents fail to contain essential allegations required by subsections (e) and (f) of Section 203.12 of the Rules and Regulations of the Board which lays down the requirements of the allegations necessary to constitute a charge.[9]

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9. This section of the Board's Rules and Regulations reads: "SEC. 203.12 *Contents.*—Such charge shall contain the following:

"(a) The full name and address of the person making the charge.

"(b) If the charge is filed by a labor organization, the full name and address of any national or international labor organization of which it is an affiliate or constituent unit.

"(c) The full name and address of the person against

A document of this type, which fails to satisfy the requirements laid down by the Board's Rules and Regulations as necessary to constitute a charge, is not a

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whom the charge is made (hereinafter referred to as the 'respondent').

"(d) A clear and concise statement of the facts constituting the alleged unfair labor practices affecting commerce.

"(e) If the charge is filed by a labor organization, a statement whether it and any national or international labor organization of which it is an affiliate or constituent unit, has complied with section 9(f), (g), and (h) of the act.

"(f) If the charge is filed by a labor organization and if it alleges that it is in compliance with the provisions of section 9(f) and (g) of the act, the number and expiration date of the letter of compliance issued by the Secretary of Labor pursuant to the regulations of the Department of Labor."

Rule 203.13 implements Rule 203.12. It reads:

"Sec. 203.13 *Compliance with section 9(f), (g), and (h) of the act.*—(a) For the purpose of these Rules and Regulations, compliance with section 9(f) and (g) of the act means (1) that the labor organization has a letter of compliance issued by the Secretary of Labor pursuant to the rules of the Department of Labor; and (2) that there is on file with the regional director, either as part of the charge or otherwise, a statement by an authorized representative of the labor organization under oath, that it has such letter, and giving the number and expiration date thereof.

"(b) For the purpose of these rules and regulations, compliance with section 9(h) of the act means that a national and an international labor organization has on file with the general counsel in Washington, D. C., and a local labor organization has on file with the regional director in the region in which the proceeding is pending:

"(1) An affidavit by an authorized representative of the labor organization, under oath, executed contemporaneously with the charge or within the preceding 12-month period, listing the titles of all offices of the organization and stating the names of the incumbents, if any, in each such office and the date of expiration of each incumbent's term.

"(2) An affidavit by each officer referred to in subparagraph (1) of this paragraph, executed contemporaneously with the charge or within the preceding 12-month period, stating that he is not a member of the

"charge" within the meaning of the law. The rules referred to above and quoted in the footnote were duly adopted and promulgated. They are lawful. They are within the authority granted the Board in the National Labor Relations Act, as amended, and the Federal Administrative Procedure Act. They were established in accordance with the requirements of the Administrative Procedure Act. They cannot be changed or modified by the Board in the course of deciding a case pending before it. In fact, it cannot be changed without compliance with law which includes at least publication in the Federal Register. *Administrative Procedure Act,* Section 4(a).[10]

The definition of charge stated in the regulations has the force of law. *Maryland Casualty Company v. United States,* 251 U.S. 342. The court there states, at p. 349:

> "It is settled by many recent decisions of this court that a regulation by a department of government,

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Communist party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

10. "Sec. 4(a) *Notice.*—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision." (Citing cases).

See also *Fawcus Machine Co. v. United States*, 282 U.S. 375. The purported charges do not satisfy the law. In the eyes of the law, no charge has been filed.

Since there can be no jurisdiction without a charge, it is clearly and affirmatively apparent upon the face of the formal papers that the Board's unfair labor practice hearing, and its subpoena ancillary to that hearing, are without the support of even a prima facie claim of jurisdiction or statutory authority.

3. It Affirmatively and Clearly Appears from the Formal Papers of the Board and Upon the Record Before the District Court That the Board Has No Jurisdiction Because the Charging Labor Organization Has Not Complied with Subsections (f), (g), and (h) of Section 9 of the Act, as Amended.

In addition to limiting the jurisdiction of the Board to those unfair labor practices with respect to which a charge is filed and served within six months, the 1947 amendments also prohibit the issuance of a complaint—and in turn deny jurisdiction—where the charging union fails to submit financial reports to its members and the Secretary of Labor (Act, Sec. 9(f) and (g)).[11] They also

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11. Section 9 of the National Labor Relations Act reads in part:

"(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and

added subsection (h) to Section 9, which in part reads as follows:

> "* * * no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods * * *."

The amendments to Section 9, like the amendment to Section 10(b) discussed above, were enacted on June 23, 1947 and became effective on August 23, 1947.

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any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, * * *"

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9(c) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection."

These amendments go to the jurisdiction of the Board just as do the requirements that a charge be filed, that a complaint issue and that the charge be served within the time provided. Thus, the Board has no jurisdiction over an alleged unfair labor practice where the charge is made by a non-complying labor organization.

On the face of the formal papers in the Board's proceeding, it appears that the charging labor organization has not complied with these subsections. Thus, the charge (R. 31-36) contains no allegation that there has been compliance although such an allegation is required by the Board's Rules and Regulations.[12] Similarly, the charge fails to allege the number and expiration date of the letter of compliance issued by the Secretary of Labor although this, too, is required by the Rules and Regulations of the Board defining the contents of the charge.[13]. Non-compliance is further apparent upon the formal papers from the failure of the complaint to contain the allegations of jurisdictional facts that there has been such compliance.

Non-compliance with the non-Communist affidavit requirement is further apparent upon the face of the formal papers. These show that the charging union is affiliated with the CIO (R. 32, 34, 36). The District Court and this Court may take judicial notice of the fact that the CIO national officers have refused to file the non-Communist affidavits.

Non-compliance is more obvious. Non-compliance by the local officers is admitted by the Board. Thus, the Board

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12. Board's Rules and Regulations Section 203.12(e). This section is printed in full in Footnote 9 above.

13. Rules and Regulations of the Board, Section 203.12(f). This subsection is printed in full in Footnote 9 above.

was requested to admit, and did admit (R. 48, 49), the following facts:

> "3. During the period between August 23, 1947, and June 15, 1948—files of the National Labor Relations Board relied on by the General Counsel in issuing the complaint in Case No. 20-C-1570, 1571, 1572 contained no affidavit satisfying Section 9(h) of the Act—to-wit: that the affiant was not a member of the Communist party or affiliated with such party and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods—signed by any person claiming to be an officer or agent or representative of Local 227 of International Union of Brewery, Flour, Cereal and Soft Drink Workers of America, CIO, other than Eugene J. McCann and Harold A. Bondy.
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> "4. Eugene J. McCann who had such affidavit on file gives his position as 'General Super and Trustee, State of California,' and Harold A. Bondy, who had such affidavit on file, gives his position as 'Assistant General Super and Trustee, State of California.'
>
> "5. Up to June 15, 1948, the Board's files relied on by the General Counsel in issuing the complaint in Case No. 20-C-1570, 1571, 1572, contained no affidavit purporting to satisfy Section 9(h) of the National Labor Relations Act signed by a President or Secretary of said Local 227 until, if at all, sometime after June 15, 1948."

This fact, that there has been no compliance with the non-Communist affidavit requirement, apparent on the face of the formal papers, is confirmed in the record of the Board before the Court. We shall refer to this record

merely to corroborate what appears upon the face of the formal papers.

Prior to the time the appellant herein was served with the subpoena, and thus first became affected by the Board's proceeding, the employers who were participating in that proceeding had raised substantially the same questions with respect to the Board's jurisdiction that are relied upon by the appellant here. The same points were made by the AFL union (Joint Local Executive Board of California, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, AFL) that had intervened in the Board's proceeding to oppose granting any relief based on the charges of the CIO union.

At the beginning of the proceeding before the Board, when General Counsel for the Board sought to introduce the purported complaint into the file before the Trial Examiner, the employers objected on the ground there was no showing that there had been compliance with the non-Communist affidavit requirements of law. Thus the counsel for one of the employers stated:

> "There is no proof in the proceedings here that the charging party or parties, whichever it may be, have complied with the Communist Affidavit provisions and the information provisions. Until there is proof that that has occurred, there is no showing that the General Counsel had any authority to issue the Complaint. Until there is a showing that the General Counsel had authority to issue the Complaint, there is no basis for proceeding here and there is no basis for accepting in evidence a document which purports to be a complaint." (R. 38, 39).

This was repeated on June 15:

"Mr. Ernst. Mr. Examiner, before we go into your ruling on the objection, I think there has been no evidence to show that the union involved here has complied with (f), (g), and (h), Section 9, and I wondered if the proper procedure isn't to have that showing, both because of the appearance of Counsel for the union and secondly because the complaint is based upon a charge signed by that union. We have a running objection, I have said, as to the point.

"Trial Examiner Whittemore: It seems to me that you or somebody has raised this question before and it already has been disposed of." (R. 42, 43).

Subsequently, during the hearing, an officer of Local 226, the labor organization that filed the charge, was produced as a witness and counsel for the employer sought to interrogate him with respect to his having filed a non-Communist affidavit. The following colloquy occurred:

"Q. (By Mr. Rowland) Mr. Main, were you at the time of this trouble an officer of Local 227?

A. Yes sir.

Q. Are you an officer now?

A. Yes sir.

Q. Have you filed the non-communist affidavit?

Mr. Leonard. Objected to on the ground it is incompetent, irrelevent, and immaterial.

Trial Examiner Whittemore. I will sustain the objection.

Mr. Rowland. May I inquire at this point, is it the position of the Examiner that we have no right to inquire as to whether or not the affidavits have been filed and whether the charging union here is qualified under the Act?

> Trial Examiner Whittemore. Very frankly, Mr. Rowland, I am under the impression that it is neither your business nor my business as to whether or not they have done it. Congress specifically stated it was General Counsel's business, and I frankly don't consider that either you nor I are involved. That is General Counsel's responsibility to see to it that that provision of the Act is lived up to before the complaint is issued." (R. 43)

At this point counsel for the AFL union intervened:

> "Mr. McCarthy. And there is no way to test any error of judgment on the part of the General Counsel? We must be bound by that also?
>
> Trial Examiner Whittemore. Well, I have not happened to have run into this particular issue before. I don't know of any—it is an administrative matter." (R. 43, 44).

Subsequently, counsel for the employers sought information as to who were the officers of the charging union and whether affidavits had been filed. Counsel for the union and the General Counsel refused to give any information and the Trial Examiner refused to ask them to give any information to show whether or not the Board had jurisdiction.

> "Mr. Ernst. Mr. Examiner, could we ask General Counsel if General Counsel's office will give us the information as to who are the officers of Local 227 and who should have filed affidavits, and if they will give us the information as to when they did? It being our contention that these matters must be disposed of before you can go into the merits of the case.

Mr. Law. Well, we must, of course, refuse. It is our contention that the compliance of the charging union is not a matter for litigation at this hearing."

* * * * * * *

"Mr. Ernst. * * * I think we are entitled to get an answer from General Counsel and C. I. O. whether they are going to help us; secondly, if they are not, whether the Trial Examiner will ask General Counsel and Counsel for the C. I. O. to give us any information on that. Can't we have simple answers to those questions?

Mr. Law. You have our answers already.

Trial Examiner Whittemore. You have answers to the questions from two individuals to whom you have raised them. You have not raised them to the Trial Examiner as yet.

Mr. Ernst. We hereby request the Trial Examiner to request General Counsel and Counsel for the C. I. O. to procure that information.

Trial Examiner Whittemore. I regret to inform you I must decline." (R. 44-45).

On June 22, 1948, the General Counsel produced as a witness the employee of the Board who had control over the file in the proceeding. Counsel for the employers sought to question her with respect to whether affidavits were on file. The following occurred:

"Q. (By Mr. Kuchman) And what is the significance of the docket number? Does it represent a file?

A. Yes, it does.

Q. And does the file then contain all of the papers pertaining to that proceeding?

A. Yes, it does.

Q. Is it indicated in that docket whether or not affidavits had been filed by the charging Union, on

behalf of its officers, that they are not members of the Communist Party?

Mr. Magor. I object to that question on the grounds it is incompetent, irrelevant and immaterial to the issues in this case, wholly apart from the direct examination.

Trial Examiner Whittemore. I will sustain the objection.

Mr. Ernst. Well, Mr. Examiner, they brought the person in here to testify and apparently they have written consent from the General Counsel for the witness to testify as to what she does and what are in her records and what are in their files. They have opened it up on direct examination, they have got the written authority to put her on, and I think we are entitled to go into everything that is in the files under her control.

Mr. Magor. It is a wholly collateral attack.

Trial Examiner Whittemore. I see no reason to reverse my ruling." (R. 45, 46).

The foregoing quotations demonstrate an utter refusal, not merely a neglect, to show any legal and factual basis for assuming jurisdiction in the proceeding. It shows that no complaint could lawfully issue because the charging union has not complied with subsections (f), (g), and (h) of Section 9. This further shows that General Counsel for the Board has consistently blocked the employers' efforts to present testimony on jurisdiction. Apparently to protect itself against further proof of the utter lack of jurisdiction, the office of the General Counsel has withheld the official records that corroborate it.

The face of the formal papers, corroborated by the record, show that the charging union had not complied

with subsections (f), (g), and (h) of Section 9 and hence that there was no authority to issue a complaint or any jurisdiction to conduct the hearing.

4. It Affirmatively and Clearly Appears on the Face of the Formal Papers of the Board That the Facts Necessary to Give the Board Jurisdiction in Its Proceeding Have Not Been Alleged.

It is well established that a tribunal of limited jurisdiction has no statutory authority or jurisdiction to carry on a proceeding unless the formal papers, upon which it is founded, include allegations of the necessary jurisdictional facts. This is true not only of administrative tribunals, but even of the federal courts. Thus the Supreme Court has stated in *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189:

> "* * * The party who seeks the exercise of jurisdiction in his favor * * * must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing * * * If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof."

See also *Hull v. Burr*, 234 U.S. 712; *Gully v. First Nat'l Bank*, 299 U.S. 109; *KVOS, Inc. v. Associated Press*, 299 U.S. 269; *Thompson v. Moore*, 109 F.2d 372; *Brown v. Coumanis*, 135 F.2d 163. In the absence of distinct averments of the necessary jurisdictional facts, the Board —just like a federal court—has no jurisdiction to proceed.

The failure to allege the facts that were made jurisdictional by the 1947 amendments to the Act is obvious. Specifically, there is no allegation that the officers of the charging union have each on file the necessary affi-

davits; it is submitted that such an allegation would be contrary to the fact. There is no allegation that the charging union has furnished the required financial reports; the facts as to this are unknown to respondent. There is no allegation that a charge was served on any of the respondents, much less that it was served within six months of the alleged unfair labor practices; General Counsel bases his case on service on February 13, 1948, eighteen months after the alleged unfair labor practices.

The failure of the complaint to contain the necessary allegations of the jurisdictional facts makes it clearly apparent that the Board has no jurisdiction to proceed and therefore had no authority or jurisdiction to issue the subpoena.

5. The Formal Papers of the Board Upon Which Its Claim to Jurisdiction Depends Do Not Include a Lawfully Issued Complaint.

As has been shown above, the purported complaint (R. 24-36) affirmatively shows that it is not a true complaint because it shows on its face that there was no authority or jurisdiction to issue it. Section 9 and Section 10(b) both expressly provide that a complaint shall not issue where the facts are as stated in the purported complaint relied upon by the Board. Hence, as it is well established that a complaint must lawfully issue before the Board can have jurisdiction to proceed,[14] the Board proceeded without any claim of jurisdiction in ordering its hearing and in issuing the subpoena the Board seeks to have enforced.

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14. See a discussion of this on pages 19 to 22.

B. A COURT MUST REFUSE TO ENFORCE A SUBPOENA ISSUED BY AN ADMINISTRATIVE BOARD IN THE COURSE OF A PROCEEDING THAT IS AFFIRMATIVELY AND CLEARLY SHOWN TO BE WHOLLY OUTSIDE THAT BOARD'S JURISDICTION.

Appellant contends that the District Court should have refused to enforce the subpoena in order to protect the witness against the Board's abuse of the subpoena power in violation of the Constitution and statutes and in order properly to exercise the discretion granted it by Section 11(2) of the Act.[15] The Board contends that the appellant, a stranger to the Board's proceeding, must be compelled to testify even though it clearly and affirmatively appears upon the face of its own formal papers that the Board could have no possible jurisdiction in the hearing. In short, the Board contends that the court should enforce the subpoena simply because the Board has decided to hold a hearing and issue a subpoena.

The contention of the Board would give no individual any right to defend against an administrative subpoena. However, the law expressly guarantees the right to defend against unlawful exercise of the subpoena power. Thus, the

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15. Section 11(2) of the National Labor Relations Act gives the District Court jurisdiction to issue an order requiring compliance with a subpoena, which reads as follows:

> "(2) In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof."

Supreme Court stated in *Myers v. Bethlehem Corp.*, 303 U.S. 41, 49:

> "The Board is even without power to enforce obedience to its subpoena to testify or to produce written evidence. To enforce obedience it must apply to a District Court; and to such an application appropriate defense may be made."

We submit that Congress has given the courts discretionary jurisdiction to enforce the Board's subpoenas so that citizens, such as the appellant before this Court, may be protected against abuse in the exercise of the subpoena power. The subpoena power is in any case a drastic one. Any exercise of it infringes on the liberty and freedom of the witness subpoenaed. Its indiscriminate use can constitute such a severe interference with the rights of private citizens as to amount to persecution. For these reasons the courts have kept its use within well-defined channels. Cf. *Boyd v. United States,* 116 U.S. 616; *Hale v. Henkel,* 201 U.S. 43; *Federal Trade Commission v. American Tobacco Co.,* 264 U.S. 298; *Cudahy Packing Co. v. Holland,* 315 U.S. 357, 363.

The private citizen's right of privacy against the government is stated by Mr. Justice Brandeis dissenting in *Olmstead v. United States,* in which he and Holmes, Stone, and Butler, JJ., dissented. He stated, at 277 U.S. 438, 478-479:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things.

> They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. *They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.* To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth." (Italics added.)

Surely a subpoena without a shred of jurisdiction to support it is an unreasonable, arbitrary and unjustifiable violation of the "right to be let alone" which the Constitution confers to individuals "as against the Government." It is well established that an exercise of the subpoena power, to be constitutional must be reasonable. *Lasson, Development of the Fourth Amendment to the United States Constitution,* 1937; *Interstate Commerce Commission v. Brimson,* 154 U.S. 447; *Hale v. Henkel,* 201 U.S. 43, 76; *Boyd v. United States,* 116 U.S. 616, 630, 634, 635. It is thus apparent that the appellant has appropriate Constitutional defenses against the enforcement of the subpoena and that the District Court violated her constitutional rights when it ordered enforcement.

To enforce the instant subpoena is furthermore to violate Section 6(c) of the Administrative Procedure Act.[16] This section provides that the subpoena of an ad-

16. Section 6(c) of the Administrative Procedure Act provides:

> "Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of

ministrative board shall be enforced only "to the extent that it is found to be in accordance with law." This provision was explained in the language of the Senate Report accompanying it as "a statutory limitation upon the issuance or enforcement of subpoenas in excess of agency authority or jurisdiction" and to require the courts to "inquire generally into the legal and factual situation and be satisfied that the agency could possibly find that it has jurisdiction" before enforcing any subpoena. Here it is obvious from the most cursory examination of the proceeding that the Board cannot possibly find it has jurisdiction.

The meaning of this provision of the Administrative Procedure Act may be clarified by consideration of the Constitutional rules established by the Supreme Court in administrative subpoena cases. The nature of the individual's right to be free of abuse of the subpoena power was stated by the Supreme Court in *Jones v. Securities &*

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procedure, upon a statement of showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law, and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply."

The Senate Report, No. 752, on the Administrative Procedure Act, provides:

"The subsection constitutes a statutory limitation upon the issuance or enforcement of subpoenas in excess of agency authority or jurisdiction. This does not mean, however, that courts should enter into a detailed examination of facts and issues which are committed to agency authority in the first instance, but should instead, inquire generally into the legal and factual situation and be satisfied that the agency could possibly find that it has jurisdiction."

Exchange Commission, 298 U.S. 1. Without dissent on this issue, the Court stated, at page 25:

> "An official inquisition to compel disclosures of fact is not an end, but a means to an end; and it is a mere truism to say that the end must be a legitimate one to justify the means. *The citizen, when interrogated about his private affairs, has a right before answering to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer.*" (Italics added.)

The nature and scope of this right of the individual has more recently been considered by the Supreme Court in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186. In that case the court stated, "Officious examination can be expensive, so much so that it eats up men's substance. It can be time consuming, clogging the processes of business. It can become persecution when carried beyond reason." The Court further stated that there must be a "basic compromise" between the public interest and the individual's private right to be let alone, and "* * * the basic compromise has been worked out in a manner to secure the public interest and at the same time to guard the private ones affected against the only abuses from which protection rightfully may be claimed. The latter are not identical with those protected against invasion by actual search and seizure, nor are the threatened abuses the same. *They are rather the interests of men to be free from officious intermeddling, whether because irrelevant to any lawful purpose or because unauthorized by law.*" (327 U.S. 186, 213)

The appellant has shown that the Board is flagrantly guilty of officious intermeddling in seeking to compel her

to come into this proceeding and testify. In five separate particulars, appellant has demonstrated that the Board has affirmatively shown on its own formal papers and by its own actions that it could not possibly have jurisdiction. Each one of them separately proves that the subpoena was issued in excess of the Board's statutory authority and was irrelevant to any lawful purpose. In such a proceeding, the appellant properly refused to testify before the Board, for it is well established that one need not submit to a demand that he testify "if in any respect it is unreasonable or overreaches the authority Congress has given." *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 217.

Virtually the exact facts that are involved in this case were used as an example of an abuse of the subpoena power in *Endicott-Johnson Corp. v. Perkins,* 128 F.(2d) 208. In this case the court stated, at page 215:

> "When * * * a fundamental factor—a lack of all possible statutory authority to compel the witnesses to answer—is apparent on the very face of the record before the court, it should, of course, refuse to enforce the administrative subpoena."

Again it stated (128 F.2d 208, 224):

> "As we have seen, an administrative proceeding might, on the face of the record, be so clearly without legal foundation that a court would be obliged to refuse to enforce a subpoena issued in aid of that proceeding. Thus, if, in a National Labor Relations Board case, the Board's order or its pleadings in a suit to enforce its subpoena, affirmatively stated or admitted that the respondent employer was engaged in a business having no possible connection with in-

terstate commerce, no court could properly order compliance with the subpoena * * *."

In the present case the formal papers before the Board do show that interstate commerce is involved. But these same papers, which are before the Court as appendices to the pleadings of the Board, affirmatively show that the jurisdictional facts under the 1947 amendments do not exist. Thus "a lack of all possible statutory authority to compel the witnesses to answer" is apparent on the very face of the record. We submit the law requires the District Court to have refused to order compliance with the Board's subpoena.

Essentially the same condition as is present in this case was, in the opinion of the majority of the Supreme Court, present in *Jones v. Securities and Exchange Commission*, 298 U.S. 1. Here the majority of the court concluded that the administrative investigation there involved "had ceased to be legitimate" and the "inquiry necessarily came to an end." While there was a disagreement as to whether this was the fact, the court agreed that if there were no legitimate and lawful proceeding under way and it had ceased to be, the administrative subpoena was not to be enforced. On this point, the court stated:

> "Since here the only disclosed purpose for which the investigation was undertaken had ceased to be legitimate when the registrant rightfully withdrew his statement, the power of the commission to proceed with the inquiry necessarily came to an end. Dissociated from the only ground upon which the inquiry had been based, and no other being specified, further pursuit of the inquiry, obviously, would become what Mr. Justice Holmes characterized as 'a fishing expedi-

> tion * * * for the chance that something discreditable might turn up' (*Ellis v. Interstate Commerce Comm'n,* 327 U.S. 434, 445)—an undertaking which uniformly has met with judicial condemnation. *In re Pacific Ry. Comm'n,* 32 Fed. 241, 250; *Kilbourn v. Thompson,* 103 U.S. 168, 190, 192, 193, 195, 196; *Boyd v. United States,* 116 U.S. 616; *Harriman v. Interstate Commerce Comm'n,* 211 U.S. 407, 419; *Federal Trade Comm'n v. American Tobacco Co.,* 264 U.S. 298, 305-307."

In the present case, the Board never had jurisdiction; its hearing never became legitimate; it has never lawfully commenced. Consequently, there is no basis for judicial enforcement of a subpoena. It is without any possible statutory authority.

The appellant, a stranger whose only interest in the Board's proceeding arises out of the service of the subpoena upon her, has asked the courts to refuse to require her to testify. She asks protection in her right to be left alone and to be free of the unjustifiable intrusion upon her privacy. She wishes to enjoy her liberty and freedom to do as she may wish. She protests the attempt to deprive her of it without due process of law. She has sought to determine why the Board is carrying on its inquiry and the basis of its assertion of jurisdiction to issue the subpoena. It appears on inquiry limited to the face of the formal papers, that for several separate reasons the Board cannot possibly have any jurisdiction. Absence of jurisdiction and statutory authority—and so due process of law—could not be more obvious. If the subpoena involved in this case is to be enforced, there is no Constitutional or statutory limit on the Board's exercise of the subpoena power.

CONCLUSION

The present case, we submit, is a flagrant and outrageous abuse of the subpoena power by a board that is clearly acting outside its jurisdiction and that refuses even to go through the formalities of claiming jurisdiction or to make a pretense of supporting it. This court, we respectfully submit, should reverse the District Court and direct that the application to enforce the subpoena be denied and the order to show cause be quashed.

Dated: San Francisco, California, May 14, 1949.

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